JAMES H. McKENNEY,
Clerk.

Brf. of Springer for Appellee

IN THE SUPREME COURT

Filed April 11, 1902.

OF THE

UNITED STATES.

OCTOBER TERM, 1901.

JOHN ROMIG & DANIEL W. HARDING,
Appellants,
vs.
MYRTLE GILLETT,
Appellee.

No. 263

REPLY AND SUPPLEMENTAL BRIEF OF APPELLEE IN SUPPORT OF THE MOTION TO DISMISS THE APPEAL.

GEORGE P. ROSH & WILLIAM M. SPRINGER,
Attorneys for Appellee.

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An examination of the brief of the appellants in resistance of the motion to dismiss this appeal will disclose the fact that counsel for appellants lays great stress upon the fact that the appellee had not printed sufficient of the record to disclose to the court all the facts bearing upon the points raised by the motion to dismiss.

The appellants admit that as to the affidavits as to the value of the land, the contention is well taken, as the affidavits were overlooked by counsel for appellee in the preparation of the brief upon the motion; but outside of the affidavits, we claim that there was not any diminution of the record upon the points presented by counsel for appellee upon the motion to

dismiss. And we now challenge counsel for the appellants to refer the court to any portion of the full record now filed with the court, which would aid them in passing upon such motion, which was not printed by the appellee and filed with the motion to dismiss, outside of the affidavits as to the value of the land.

In addition to the argument made and authorities cited in the brief of the appellee upon the motion to dismiss, we desire to call the Court's attention to the following propositions and authorities:

The law of Congress governs appeals to the United States Supreme Court.—Balt. etc., Railroad Co. vs. Presbyterian Church, 19 Wallace, 62 and 22nd Law Ed. 97.

There are many orders, interlocutory and otherwise, that are appealable by statute from the District to the Supreme Court of the different states and territories that are not appealable under the acts of Congress to the Supreme Court of the United States.

It is well settled that an appeal will not lie, in the absence of a statute, from an interlocutory order, judgment or decree. There must be a final judgment in a cause to permit a review.

People v. Thurston, 5th Cal. 517.
Tatum v. Yahm, 29th Southern 201.
Morse v. Rankin, 51 Conn. 325.
Allen v. Savannah, 9th Ga. 286.
Ex parte v. Thompson, 93rd Ill. 89.

Thompson v. Service, 90th Ind. 128.
Atchison Railroad etc. Co. v. Brown, 26 Kas. 443.
Howard v. Louisville etc, Railroad Co., 17th Ky. Law Rep. 814.
State v. Brown, 75th Maine 456.
Cunningham v. Carroll County, 48th Atlantic (Md.) 1046.
Comins v. Turner's Falls Co., 140th Mass. 146.
Holbrook v. Cook, 5th Mich. 225.
Johnson v. Board of Education, 65th Mo. 47.
Cooper v. Vanderveer, 47th N. J. L. 178.
Feist v 3rd Ave. R. Co,, 13 Misc. (N. Y.) 240.
25th N. Y. Civ. Proc. 257, 34th N. Y. Suppl. 57.
68 N. Y. St. 13.
Hailey v. Gray, 93rd N. C. 195.
Evans v. Iles, 7th Ohio State, 233.
Mackaness v. Long, 85th Pa. St. 158.
Whitfield v. Greer, 3rd Baxt. (Tenn,) 78.
Parris v. Mason, 37th Tex. 447.
Nelson v. Brown, 59th Vt. 600.
Tucker v. Sandridge, 82 Va. 532.
Hays v. Fischer, 102 U. S. 121, 26th ed. 95.

Interlocutory orders are appealable, in the absence of a permissius statute, only on appeal from a final judgment that is rendered in the cause.

Davie v. Davie, 52nd Ark. 224.
12 S. W. 558.
20th Am. St. Rep. 170.
Baker v. Baker, 10th Cal. 527.
De Barry v. Lambert, 10th Cal, 503.
Deluth Transfer Co. v. Deluth Terminal Co., 81st Minn. 63.
83rd N. W. 497.
Gilmore v. Ham, 61 Hun. (N. Y.) 1.
21st N. Y. Civ. Proc. 102.
15th N. Y. Suppl. 391.
39th N. Y. St,,
Bennett v. Shelton, 117 N. C. 103.
23rd S. E. 95.
Martin v. Flippin, 101 N. C. 452.

8th S. E. 345.
Nelson v. Brown, 59th Vt. 600.
Harper v. Vaughn, 87th Va. 426.
Schattschneider v. Johnson, 30th Wis. 387.

The judgment must determine the matter and leave nothing further to be determined.

Standley v. Hendrie etc. Mfg. Co. 55th Pac 723.
Guarantee Trust etc. Co. v. Philadelphia etc. Rld. Co., 69th Conn. 709.
McFarlan v. Larkin, 21st N. E. 565.
Thompson v. Pickel, 20th Ia. 490.
Riley v. Farnsworth, 116 Mass. 223.
Dcikhart v. Rutgers, 45th Mo. 132.
Wentworth v. Treanor, 31st N. H. 528.
Newark Plank Road etc. Co. v. Elmer, 9th N. J. Equity 754.
Dickenson v. Codwise, 11th Paige (N. Y.) 189.
Hoobs v. Beckwith, 6th Ohio State 252.
Hays v. Stewart, 23rd Vt. 622.
St Clair County v. Lovingston, 16th Wal. (U. S.) 628.
21st L. ed. 813.
Desvergeys v. Parsons, 60th Fed. 143.
23rd U. S. App, 239
8th C. C. A. 526.

The organic Act of the Territory of Oklahoma requires that before an appeal can be taken from the Supreme Court of the Territory to the Supreme Court of the United States, the matter involved must exceed the sum of $5,000.00. "Section 9 of the Organic Act of the Territory of Oklahoma."

In order to be appealable under the above section the matter directly involved must exceed the sum of $5,000.00 to give the right of appeal to the United States Supreme Court, a remote consequence and

mere incidental claims, or collateral effects of a judgment will not be considered.

Oakley v. Hibbard, 2nd Pinn. (Wis.) 21.
52 Am. Dec. 139.
Hollander v. Fechheimer, 162 U. S. 386.
40th L. ed. 985.
Abadie v. U. S., 149 U. S. 261.
37th L. ed. 726.
Cameron v. U. S., 146 U. S. 533.

A contingent loss or damage which may accrue to complainant can not be considered on the appeal to enjoin the levy of an execution.

Ross v. Prentiss, 3rd How. (U. S.) 771.

The jurisdictional amount must be determined by the amount in controversy in the particular proceeding, and not in the collateral effect of a decision upon the claims of other parties, or upon the defendants in another proceeding by the same parties.

U. S. v. Wannamaker, 147 U. S. 149.
Millaudon v. Judge, 6th Mart. N. S. (La.) 24.
Hosack v. Crill, 197 Pa. St. 370.

(In which is held that the amount actually in controversy controls, though the judgment may incidentally settle the right of future sums greatly in excess of the jurisdictional amount.)

Clay Center v. Farmers L. & T. Co., 145th U. S. 224.
36th L. ed. 685.
Rodier v. Lapierre, 21st Can. Supreme Ct. 69.
Dominion Salvage etc. Co. v, Brown, 20th Can. Supreme Ct. 203.

The particular demand controls.

Ross v. Prentiss, 3rd How. (U. S.) 771.

Where the possession is in issue the value of possession and not the title determines the jurisdiction.

Flagg v. Walker, 109th Ill. 494.
Norwood v. Wimby, 104th La. 645.
Harris v. Stockett, 35th La. Ann. 387.
Harris v. Barber; 129th U. S. 366.

In actions involving the validity of a judgment, the amount of the judgment determines the appellate jurisdiction, where the appellate jurisdiction depends upon the pecuniary amount.

Singer v. McGuire, 40th La. Ann. 638.
4th So. 578.
Factors etc. Ins. Co. v. New Harbor Protection Co., 39th La. Ann. 583.
2nd So. 407.

In many of the states appellate jurisdiction is given to the Supreme Courts where the title to real estate may be involved regardless of the amount or value of the real estate; but in such cases, in order to give the appellate court jurisdiction, the title to real estate must be directly involved.

Hahn's Peak etc. & Canal etc. Min. Co. vs. Lees, 62nd Pac. 841.
Paddack v. Staley, 49th Pac. 281.
Wiatt v. Larimer Irrigation etc. Co., 33d Pac. 144.
Carbine v. Fox, 98th Ill. 146.
Duckworth v. Mosier, 4th Ind. Appl. 267.

Newell v. Daniels, 5th Kans. App. 505.
47th Pac. 565.
Bourne v. Beck, (Ky. 58 S. W. 690.
DeBlois v. New Orleans, 45th La. Ann. 1308.
14th So. 190.
Larue V. Smith, 153 N. Y. 428.
Hill v. Water etc, Com'rs. 150 N. Y. 547.
Miele v. Deperino, 135th N. Y. 618.
Bassett v. Bassett, 5th Cinc. L. Bul. 440.
Farmers Bank v. Hoof, 7th Pet. (U. S.) 168.

Counsel for appellants in their brief opposing the motion to dismiss this appeal, try at great length to convince the Court that all the equities of this case are with the appellee, and that this court should strain the law, if necessary, to award the land to the appellants in this case, and call the Court's attention to the great value of the land and to the improvements placed upon it by the appellants. But they fail to call the Court's attention to the fact that on the 23rd day of February,1897, the appellee, John Romig, bought this land for the enormous sum of $475—(see original record page 39, printed record page 23), and within a few days, to-wit: On the 9th day of March, 1897, Romig sold the land to the appellant, Daniel W. Harding, for the sum of $900.00 (see original record, page 67, printed record, page 37), and that, too, without any actual or constructive notice to the owner of the land, Myrtle Gillett, who was a resident of the Territory of Oklahoma, and who had resided open and notoriously within twenty miles of the land

in controversy, and of a sitting of the court where the judgment was rendered, continuously from the filing of the original suit and up to the time of the filing of the application to set aside the judgment on the 11th day of May, 1898.

Harding cannot claim that he is an innocent purchaser of the land because he was chargable with constructive notice, at all times, of the condition of the record, and of the fact that no legal service had ever been had upon Myrtle Gillett, and, according to the statement of his counsel in their brief, on page nine, he had actual notice of the condition of said record. It is there stated "without her undertaking to repeat in detail what had been above stated, it is proper to remind the Court that appellant, Harding, having caused examination to be made of the several orders, decrees and proceedings had therein, and finding the same, so far as they appear of record, to be regular in form and in supposed compliance with the law, being a purchaser of the property from Romig for a valuable consideration in perfect good faith and without notice."

If he examined or caused to be examined the record he had not only constructive but actual notice of the condition thereof, and it is immaterial that he supposed that the record was in compliance with the law, because knowing the exact condition of the record

he was chargable with notice of the fact that such record showed that there had been no service upon the defendant, Myrtle Gillett.

Appellants counsel claim, pages three and four of their brief, that the appellee was guilty of great latches in filing her motion to set aside the judgment.

The record shows that the land was sold on the 23rd day of February, 1897, see original record page 48, printed record page 28, and that on the 11th. day of May, 1898, the appellee filed her motion to set aside the judgment, and the record shows that she had no actual or constructive notice of the pendancy of such action until long after the rendition of the judgment, and the sale of said land. See original record page 52-3 and 4, printed record page 29, 30 and 31.

In the case of Carey V. Reaves, 46th, 577, the affidavit to set aside the void judgment was filed 22 years after the rendition of the judgment, and the judgment was finally set aside 30 years afterwards.

Where there is a void judgment the mere lapse of any length of time will not stop the rightful owners of the property from setting up their title to the same. "A void judgment is in legal effect no judgment. By it no rights are vested. From it no rights can be obtained. Being worthless in itself all proceedings founded upon it are worthless. It neither binds or bars anyone. All acts performed under it,

and all claims flowing out of it are void. The parties attempting to enforce it will be responsible as trespassers. The purchaser at a sale finds himself without title and without redress. The first and most material inquiry in relation to a judgment or decree then, is in reference to its validity. For if it be null, no action on the part of the plaintiff, no inaction on the part of the defendant, no resulting equity in the hands of third persons, no power resting in any legislature or other department of the government can invest it with any of the elements of power or of validity. This inquery is to be presented only on an investigation of jurisdictional facts, upon whose real or assumed existence every valid judgment must stand."

In any event, this is not on appealable order, that is, such an order as is appealable to the Supreme Court of the United States. It is merely an interlocutory order setting aside a judgment in the District Court of Garfield County, Oklahoma Territory, in an action for the foreclosure of a mortgage for $700.00. The judgment being set aside as to the defendant, Myrtle Gillett, if called a service, leaves the action of foreclosure still pending in that court.

The order resisting Myrtle Gillett was prepared and read and was only the exercise of the inherent power of a court of equity to prevent the

abuse of its process. The court in this case found that Myrtle Gillett had never been served with process in this cause, and that therefore, she had never been a party to such action, and that, so far as she was concerned, the judgment was a nullity, and that having been a purchaser of the title from Don Gillett, prior to the institution of the suit, and having been wrongfully dispossessed of said land under a writ of assistance issued out of said court, that she should be restored to the possession from which she had been wrongfully ousted by the improper order of the Court.

In Skinner vs. Peatty, 15th California, 156, it is held, that "If a writ of assistance be improperly issued or executed, the court can, on summary motion. set it aside and restore the possession. The same doctrine is enunciated in the case of Wiley vs. Carlisle, 93rd Ala., 237. "Where a writ of assistance is set aside, the party dispossessed under it is entitled to be restored to the possession of the premises."

Chamberlain v. Choles, 35th N. Y., 477.
3rd Abb. Prac. (N. S.), 118.
Meiggs v. Willis (Com. Pl.) 8th Civ. Proc. R., 125.

Respectfully submitted.

GEORGE P. RUSH,

WILLIAM M. SPRINGER,

Attorneys for Appelle.